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Supreme Court of the United States

October Term, 1976

Nos. 76-1724, 76-1841, 76-1842

FEDERAL COMMUNICATIONS COMMISSION,
AMERICAN BROADCASTING COMPANIES, INC., and
NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioners,

v.

HOME BOX OFFICE, INC., et al.,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT BRIEF IN OPPOSITION FOR RESPONDENTS COLUMBIA PICTURES INDUSTRIES, INC., MCA INC., METRO-GOLDWYN-MAYER INC., PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, UNITED ARTISTS CORPORATION, WARNER BROS. INC. and MOTION PICTURE ASSOCIATION OF AMERICA, INC.

WILNER & SCHEINER
ARTHUR SCHEINER
ROBERT D. HADL
2021 L Street, N.W.
Washington, D.C. 20036

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
GERALD MEYER
A. BRIAN SAVIN
40 West 57th Street
New York, New York 10019

MOTION PICTURE ASSOCIATION OF AMERICA, INC.
BARBARA SCOTT
JAMES BOURAS
522 Fifth Avenue
New York, New York 10036

July 22, 1977

DI CESARE - Printing — Washington, D.C 20006 (202) 331-8101

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JOINT BRIEF IN OPPOSITION

This joint brief is submitted by respondent motion picture companies[1] and respondent Motion Picture

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[1]Columbia Pictures Industries, Inc., MCA Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation and Warner Bros. Inc. brought the petition for review in Case No. 75-1430 below. Metro-Goldwyn-Mayer Inc. and United Artists Corporation brought the petition for review in Case No. 75-1496 below.

Association of America, Inc.,[2] in opposition to the petitions for writs of certiorari filed by the Federal Communications Commission ("Commission"), the American Broadcasting Companies, Inc. ("ABC"), and the National Association of Broadcasters ("NAB") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 25, 1977.

OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. The *First Report and Order* of the Commission in Dockets 19554 and 18893 is reported at 52 FCC2d 1 (1975); the *Memorandum Opinion and Order* on reconsideration thereof is reported at 54 FCC2d 797 (1975); and the *Second Report and Order* in Docket 19554 is reported at 35 Rad. Reg. (P&F)2d 767 (1975).

The full texts of the opinions below are printed in Appendices A-F to the petition for a writ of certiorari filed by the Commission (No. 76-1724). For convenience, reference herein will be to the Commission's Appendices ("FCC App. ——").

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977 (FCC App. G, pp. 243-246). A partial stay of mandate, which did not include the feature film rule (47 C.F.R. §76.225(a)), was granted by the court of appeals on

[2]Case No. 75-1555 below.

May 4, 1977 (FCC App. H, pp. 247-250). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the ABC and NAB petitions present any important public interest issue justifying further review of limitations imposed by a Commission rule on pay cable showings of feature films when the Commission has now abandoned the rule and no longer defends it in this Court.

2. Whether the court of appeals correctly set aside the feature film rule as imposing arbitrary, unlawful and unconstitutional restraints on the right of the viewing public to see movies in their homes uninterrupted by commercial advertising, uncut to fit commercial television time slots, unedited to satisfy the tastes and mores of the network censor, and at a fraction of box-office prices.

REASONS FOR DENYING THE WRIT

In its *First Report and Order, supra* (FCC App. C, pp. 123-204), the Commission adopted rules sharply limiting subscription services[3] from showing feature films and

[3]The Commission uses the term "subscription services" to refer to both subscription television ("pay television") and subscription cablecasting ("pay cable"). Pay television involves the over-the-air broadcasting of a scrambled television signal which, on payment of a fee, may be unscrambled and viewed on home receivers by subscribers. Pay cable involves the closed circuit distribution by wire of nonbroadcast programming for which the cable television system subscriber is charged an additional program or channel fee beyond the regular monthly fee for the system's television signal reception service.

series-type programs to the viewing public. The feature film rules were complex (FCC App. C, pp. 171-179, 191, 192-93). Pay cable could offer feature films:

> –Without restriction *only* for a three-year period following their general release in theatres (a wholly arbitrary limitation, since the most popular films remain in theatrical exhibition the longest and would, therefore, get a shorter and insufficient pay cable run, or possibly no pay cable run at all).
>
> –During the 3-10 year period after theatrical release, *only* if the films were under license and available for commercial television broadcast (an illusory rule, because network and local stations normally insist upon and obtain contractual exclusivity against pay cable during the broadcast availability period).
>
> –More than 10 years after theatrical release, *only* if the films were not telecast for the prior three years and, therefore, according to the Commission were "undesirable" (an irrational rule that penalized the producer who licensed his film to commercial television).

The series rule was even more restrictive than the feature film rule. Only those series, no episode of which was ever broadcast on commercial television, could be shown on pay cable or pay television (FCC App. C, pp. 187-88, 192, 194).

Following the filing of petitions for review in the court of appeals, however, the Commission repealed the series rule (FCC App. E, pp. 219-234). Now, following the decision of the court of appeals setting aside all the pay cable rules,

the Commission has announced it will no longer defend the pay cable feature film rule, 47 C.F.R. § 76.225(a). Its petition for a writ of certiorari is limited to the other pay cable rules set aside by the court below, 47 C.F.R. §§76.225(b)-(d). These other rules pertain to the pay cable showing of sports events and the ancillary limitations providing that no more than 90% of the total pay programming hours may be devoted to feature films and sports events, and banning commercial advertising announcements.

However, ABC, one of the three networks, and NAB, representing the interests of the broadcast industry, seek further review and retention of the pay cable feature film rule, as well as the other pay cable rules set aside by the court below. They represent a dwindling broadcast group in favor of the rules.[4] By contrast, the Department of Justice, the President's Office of Telecommunications Policy and numerous public interest groups[5] all argued against the rules. Indeed, the United States, a statutory respondent in the court below (28 U.S.C. §2344), vigorously opposed the Commission and argued that the feature film rule–and all the pay cable rules–should be set aside. Even the Commission, finally and

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[4] Significantly, the two other networks, CBS and NBC, who were petitioners below, do not seek further review in this Court. Further, Metromedia, Inc., a large group owner of television stations and also a petitioner below, which focused its argument on the need for the feature film rule, does not seek further review.

[5] American Civil Liberties Union, Aspen Institute for Humanistic Studies, National Urban League, National Black Media Coalition, Authors League of America, United States Conference of Mayors, Kennedy Center, Lincoln Center, Metropolitan Opera, Action for Children's Television.

belatedly, has now agreed that the feature film rule should be abandoned.

Under these circumstances, respondents sumbit that the petitions of ABC and NAB seeking review of the pay cable feature film rule—a rule no longer defended by the agency that adopted it—do not present any public interest issue or important question of law warranting further review in this Court. Further, respondents submit that the decision below, setting aside the pay cable rules in their entirety, is plainly correct. Indeed, several of the grounds on which the court below relied in invalidating the pay cable rules, namely that the rules are grossly overbroad and that the Commission failed to consider adequately their anticompetitive effect,[6] are not even challenged by either the Commission, ABC or NAB. Whether taken singly or in combination, the many substantive and procedural bases which the court below gave for setting aside the pay cable feature film rule—and all the pay cable rules—as "arbitrary, capricious and unauthorized by law" (FCC App. A, p. 20) constitute strong and compelling reasons for invalidating the rules and denying further review in this Court.

I

The posture of this case as it relates to the Commission's rules—now repealed or abandoned—affecting the showing of feature films or series-type programs demonstrates that no important questions of law are presented warranting further review in this Court.

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[6]FCC App. A, pp. 60-75, 88-91, 97.

(A) The restriction on showing series-type programs (FCC App. C, p. 192, §73.643(c); p. 194, §76.225(c)) was repealed by the Commission (FCC App. E, pp. 219-234) after petitions for review were filed in the court of appeals[7] and is not challenged in this Court by any party.

(B) The rules restricting the showing of feature films by pay cable systems were set aside by the court below on March 25, 1977 (FCC App. A, p. 112). Thereafter, on April 15, 1977, the Commission issued a public notice stating that it would seek further review in this Court "of all aspects of the Court's opinion *with the exception of that part striking down the restrictions on movies*" (FCC Mimeo 80909) (emphasis supplied). The Commission's decision to abandon its defense of the feature film rule was communicated to the court below on April 18, 1977, in its motion for a partial stay of mandate (FCC App. H, p. 247). Its petition for a writ of certiorari in this Court, although not a model of clarity in delimiting those aspects of the decision below for which it seeks further review, also makes the same representation to this Court in two footnotes:

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[7]FCC App. A, p. 112. The court below made clear that if the restrictions on series type of programs had not been rescinded by the Commission, the court would have invalidated the series rule (FCC App. A, p. 74):

> "We agree with petitioners that the series rule would have restricted the market for independently produced entertainment programming, thereby creating an effect directly contrary to that sought to be achieved in the Prime Time Access Rules proceedings. As a result, the series rules could not have been sustained on the record before us." (Footnote omitted.)

> "Because the Commission is not arguing before this Court for the retention of the feature film siphoning rules as modified, the discussion above will be confined to the details of the modified sports rules." (FCC Pet. p. 7, n. 5);
>
> ". . . review is not being sought of the [court's] action with respect to subsection (a) of the rules . . ." (FCC Pet. p. 8, n. 10).

Further, the Commission's Chairman, Richard Wiley, recently testified before the Senate Subcommittee on Communications that the feature film rules were not "necessary." He added:

> "I believe the Commission might well have arrived at the same conclusion about the film rules, even without the *Home Box Office* case, but could not act so long as the case remained undecided."[8]

Thus, based on the Chairman's statement, even if the feature film rules had been upheld by the court of appeals, they would have been reconsidered and set aside by the Commission itself. Under such circumstances, it would be patently wasteful of the time and energies of this Court and serve no useful purpose to grant further review of the feature film rule.[9]

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[8]Statement of Richard E. Wiley, FCC Chairman, at Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation. June 6, 1977, at 26.

[9]ABC argues that the Commission offered no explanation for its reversal of position on the feature film rule and that its decision not to seek further review of that rule in this Court is therefore arbitrary (ABC Pet. pp. 4-5). We are unaware of any case requiring an agency to offer an additional explanation for accepting a decision by a court of appeals setting aside agency rules as "arbitrary, capricious, and unauthorized by law in all other respects" (FCC App. A, p. 20).

(C) The rule restricting the showing of feature films by pay television stations, as distinguished from pay cable systems, was affirmed by the court below subject to the further proceedings ordered to determine the impact of *ex parte* contacts (FCC App. A, p. 112). The Commission, however, determined that "there is [no] proper justification for applying more stringent anti-siphoning regulations to pay television than are being applied to pay cable" (FCC Mimeo 80909, April 18, 1977). Therefore, it asked the court below to remand the pay television feature film rule to the Commission "so that it could be revoked" (FCC App. H, p. 247). The court below granted the Commission's request (FCC App. H, p. 248) and, on June 22, 1977, the Commission adopted a *Notice of Proposed Rule Making* in Docket No. 21311, 42 Fed. Reg. 34341 (July 5, 1977), proposing the deletion of Section 73.643(a) of its subscription television rules, 47 C.F.R. §73.643(a). Thus, the pay television equivalent of the pay cable feature film rule is in the process of being set aside by the Commission and is not before this Court for further review.

In short, either as to pay cable or pay television, no important public interest issue or question of law is presented warranting further review of the feature film rule. The pay cable feature film rule has been abandoned by the Commission and the Commission's Chairman has testified before Congress that the purported marketplace justification for the rule does not exist. The pay television feature film rule is not before this Court for further review. Under such circumstances, there is no real controversy before this Court, only the bare claims of two remaining broadcaster parties trying to revive the pay cable feature film rule. Respondents submit that the ABC and NAB petitions, to the extent they seek further review of the pay cable feature film rule, 47 C.F.R. §76.225(a), should be denied.

II

The issue presented by this case with respect to feature films was whether the Commission could validly impose restraints on the right of the viewing public to see movies in their homes that are uninterrupted by commercial advertising, uncut to fit commercial television time slots, unedited to satisfy the tastes and mores of the network censor, and at a fraction of box-office prices. The decision below holding that such restraints were arbitrary, unlawful and unconstitutional is plainly correct.

This case does not involve any of the grounds upon which the Commission and the courts have traditionally relied when justifying protection of commerical television against new forms of competition:

> There was no prediction of economic damage to the television networks, let alone economic damage which would impair their ability to serve the public interest.
>
> There was no prediction of economic damage to television stations, let alone economic damage which would impair their ability to serve the public interest.
>
> There was no prediction of any impact upon the Commission's allocation scheme, which is designed to bring a choice of television service to a maximum number of communities.

See FCC App. A, pp. 44, 56, 70. Instead, there was only the prediction, unsupported by any facts, that at some unspecified future date, the showing of theatrical movies on commercial television might be decreased or delayed by reason of the growth of pay cable.

Motion pictures that are made initially for theatres are a form of programming that was not even accepted by the

networks until 1961. Today, by the networks' own choice, theatrical movies are a small and declining portion of the network schedules.[10] But whether the networks use more movies or fewer movies, older movies or newer movies, is hardly a subject for federal intervention. The Commission does not dispute that it is powerless to require or prohibit the showing on commercial television of any motion pictures at all (FCC App. A, p. 50). How, then, may it validly bar or restrain pay cable from providing the public with the opportunity to view them when the networks have the unilateral and unregulated power to decide when—and indeed whether—such motion pictures will be broadcast to the public?[11]

Over the years, the Commission and the opponents of pay television and pay cable have utilized the label of "siphoning" to suggest that commercial television may be completely deprived of movies if pay use of such films is not artificially restricted. The metaphor cannot be affixed to motion pictures which, unlike other forms of entertainment, live indefinitely and after having been shown on pay cable will move to commercial television. Thus, the only question is

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[10] Made-for-television movies are now a majority of the prime time movies shown on television. The availability of these movies cannot be decreased or delayed by pay cable competition, since they are made directly for showing by the networks or local stations and are under their control (FCC App. A, p. 51).

[11] The Commission has never subjected a license renewal application to any scrutiny for the licensee's failure to show feature films and certainly not for its failure to show feature films of a particular age. Indeed, when the networks reduced the number of "movie nights" in the prime time viewing hours from 9 to 5, this "self-siphoning" of feature films by the networks evoked absolutely no response from the Commission.

when they will be available to commercial television, not *whether*. Indeed, the court below correctly determined that the Commission and other proponents of the rules had virtually abandoned the "siphoning" label and relied instead on the claimed possibility of *"delay"* in the availability of motion pictures (FCC App. A, p. 36, n. 38).

Reliance on the "delay" theory, however, to support the regulatory restraints on pay cable fails on all counts:

> There was no showing or finding by the Commission that significant delay would in fact occur.
>
> There was no showing or finding by the Commission that a delay in the showing of feature films would impair their entertainment value.
>
> There was no finding that a possible delay in the presentation of feature films is a matter affecting the public interest or affecting it to a degree which would justify the rules adopted.

See FCC App. A, pp. 60-66, 67, 81.

The fact is that delay has never been a factor in determining the popularity or commercial success of motion pictures on commercial television.[12] The court below was

---

[12]The examples are legion in which the most popular films have *not* been presented on commercial television as "fresh" product immediately following theatrical release. Such famous films as "Bridge on the River Kwai," "Lawrence of Arabia,' and "Around the World in Eighty Days," were first presented on commercial television 8, 10 and 15 years, respectively, following general theatrical release. "Sound of Music" was shown on commercial television for the first time on February 29, 1976. Although this was ten years after first general theatrical release, "Sound of Music" attracted a national audience of 58 million viewers. More recently, "Gone With the Wind" was shown on commercial television on November 7 and 8, 1976, thirty-seven years after first theatrical relaeas. Nevertheless, it attracted a national audience of 110 million viewers.

right, therefore, in determining that the record was completely barren of any evidence, findings, or reasoned explanation to support the feature film rule. This was particularly true in light of the First Amendment restrictions on any governmental limitations of free speech, the patent anticompetitive nature of the invalidated regulations, and the procedural irregularities in the Commission's decision.[13] Indeed, petitioners do not even challenge the determination by the court below that the rules are "grossly overbroad" and that the Commission failed to consider adequately the anticompetitive effects of the rules, two separate and independent reasons for denying certiorari. In short, the decision below setting aside the pay cable rules in their entirety is plainly correct and further review in this Court should be refused.

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[13]The court below held that *ex parte* contacts took place between the Commission and private industry representatives which influenced the final outcome and were impermissible since they involved "conflicting claims to a valuable privilege." *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959). While there was a disagreement among the panel on the scope of the *ex parte* ruling (see Judge MacKinnon's special concurring opinion, FCC App. B, pp. 117-122), all three members of the court agreed that the Commission's actions here were improper. Another panel of the District of Columbia Circuit, in a more recent opinion, *Action for Children's Television v. FCC*, No. 74-2006, decided July 1, 1977, has determined that in its view the special concurring opinion of Judge MacKinnon in the case below sets forth the appropriate standard. But the second panel also agrees that this case was correctly decided. *Id.*, at 31, 36-37. In any event, the District of Columbia Circuit has been asked to reexamine the entire question and further review of the appropriate standard of conduct would be premature at this time.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petitions for writs of certiorari filed by the Commission, ABC and NAB should be denied. If this Court, however, should decide to grant review of any of the discrete issues posed by the Commission, respondents urge the Court to clearly limit the issues on which review is granted, and make plain that the ABC and NAB petitions are denied with respect to the feature film rule, 47 C.F.R. §76.225(a).

Respectfully submitted,

COLUMBIA PICTURES INDUSTRIES, INC.
MCA INC.
PARAMOUNT PICTURES CORPORATION
TWENTIETH CENTURY-FOX FILM CORPORATION
WARNER BROS. INC.

Arthur Scheiner
Robert D. Hadl
Wilner & Scheiner
2021 L Street, N.W.
Washington, D.C. 20036

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Gerald Meyer
A. Brian Savin
Phillips, Nizer, Benjamin, Krim & Ballon
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Barbara Scott
James Bouras
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